

●●● Focus: Who owns employees' social media accounts?

Monday, 12 November 2012 14:45 | Written by Michael McKiernan | Quoting Erin R. Kuzz

Employment lawyers say Canadian employers are behind the curve when it comes to the ownership and control of social media accounts operated by employees.

A small number of U.S. and British decisions have touched on the issue and although Canadian courts have yet to weigh in, lawyers say the increasingly blurred lines between professional and personal activities on social media outlets mean disputes are inevitable.

Allison Greene, co-founder of Karimjee Greene LLP, says some employers take a piecemeal approach by dealing with disputes as they arise, usually at the termination of employment.

She says it's not unusual to see employers inserting clauses into severance agreements that require former employees to update their LinkedIn profiles to reflect the fact that their employment with the company has ended.

But she'd rather see employers turning their minds to social media much earlier in the process.

"I think that because the law is so unclear, employers should be thinking about developing policies at the front end in the same way they deal with intellectual property issues," says Greene.

"That way, when the relationship ends, people know where they stand."

Erin Kuzz, co-founder of Sherrard Kuzz LLP, says it's particularly important to set the rules ahead of time in the employment contract where social media use is a significant part of the job description.

"For example, if they're asked to start a Twitter account and tweet things related to the employer, then you don't want to be in a situation where they get a decent following and then they can take that account and go with it to a competitor," says Kuzz.

"Make sure it's abundantly clear who owns not only the technology but also the fruits of it. . . . Our job is all about trying to anticipate how things could go wrong and close loops before they appear."

An ongoing high-profile case in California pits Noah Kravitz against his former employer, news web site *phonedog.com*.

When Kravitz sued over his share of advertising revenue, the company countersued with a claim asserting that it owned Kravitz' Twitter account and the 17,000 followers amassed during his employment.

Kravitz set up the account while he worked with PhoneDog but removed a reference to the company in his Twitter handle when they parted ways. In February, Kravitz suffered a blow when a judge refused a motion to dismiss PhoneDog's case.

A court in Pennsylvania has also tackled the issue of ownership of a LinkedIn account in an action brought by Linda Eagle, founder of a firm called Edcomm.

Eagle set up her LinkedIn account following a suggestion by the firm's chief executive officer who encouraged all employees to create profiles listing Edcomm as their employer. But when the company changed hands and Eagle lost her job, the company used a copy of the password to replace her details with those of her successor.

Eagle claimed her former employer's move to access the account was illegal and impaired her ability to find new work by denying her access to contacts. However, in October, much of Eagle's lawsuit fell apart after the employer brought a successful motion for summary judgment.

In Britain, another court decision favoured the employers in a fight over LinkedIn contacts. In that case, Mark Ions, a recruitment consultant, had to turn over business contacts accumulated on his personal page after he allegedly used the account to approach clients for a rival company he set up shortly before resigning from his employer.

Anita Fineberg, a Toronto privacy lawyer, says it's unwise to read too much into the few decisions that touch on social media ownership.

"These cases are so fact-specific, I'm not sure there's many clear lessons at the moment. . . . Sometimes with these issues, cases come out and they raise more questions than answer," she says.

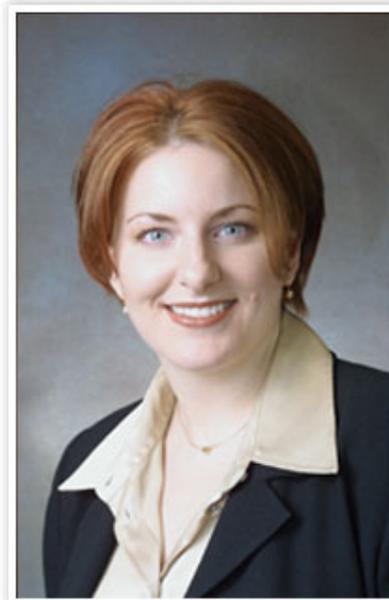
Daniel Lublin, an employment lawyer with Whitten & Lublin, says a good rule of thumb for employers and workers states that if the individual employee created and maintained the account for personal use, then it belongs to them.

"If it was created for the employer and on the employer's time with their resources, then the employer can claim ownership."

But with more people carrying existing social media accounts with them into new jobs and an increasing number of employers seeking social media engagement, the grey area between those extremes is growing larger.

Lublin says it's a particular issue for employees with a significant public profile, such as journalists with large media organizations, who owe at least part of their following to their association with their employer. He says more explicit employment contracts would help clear the confusion.

"Most haven't gotten around to drafting contracts that say what belongs to who," says Lublin.



Greene says overtime pay adds yet another wrinkle to the question of ownership in cases of mixed personal and professional use of an account.

If employees are updating their accounts and interacting with contacts outside work hours without an expectation that the company will pay them for it, there's some doubt as to whether they were devoting employer resources and time to those activities.

That could strengthen the individual's ownership claim, she says.

Greene says employers should pick their battles since there's a potential downside to claiming ownership over accounts and contacts.

"If you try to do that, you risk alienating a new generation who've grown up used to doing a lot of social media," she says.